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No. 84-598

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BURLINGTON NORTHERN RAILROAD COMPANY,
Successor in Interest by Merger to St. Louis-
San Francisco Railway Company,
Petitioner,

vs.

RAY FRAVEL,
Respondent.

On Petition for Writ of Certiorari To The
Missouri Court of Appeals, Eastern District

BRIEF FOR RESPONDENT IN OPPOSITION

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32-10

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider petitioner's contentions regarding plaintiff's argument when the decision in the State Courts below rests upon an independent and adequate state ground of decision, i.e., that such argument was a fair retort and response to defendant's own arguments and whether, in any event, plaintiff's argument may be disapproved when it merely addressed the issue of plaintiff's impaired future earning capacity in a manner entirely consistent with federal substantive law.

2. Whether this Court has jurisdiction to consider petitioner's contentions concerning the exhibition of plaintiff's injuries to the jury when petitioner's alleged federal claim was never presented to or decided by the state courts below and is, in fact, raised for the first time in this Court.

3. Whether the Missouri Approved (MAI) FELA damages instruction may be properly given when the same was designed for the express purpose of complying with the Federal Liability Employers' Act (FELA), which is an avowed departure from the common law.

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RAY FRAVEL,
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On Petition for Writ of Certiorari To The
Missouri Court of Appeals, Eastern District

OPINIONS BELOW

The opinion of the Missouri Court of Appeals, Eastern District, (App. A to the Petition) affirming the judgment for Respondent is reported as *Fravel v. Burlington Northern Railroad,* 671 S.W.2d 339 (Mo.App. 1984). The order of the Missouri Court of Appeals, Eastern District, denying Petitioner's Motion For Rehearing and/or Transfer of The Missouri Supreme Court (App. B to Petition) and the Order of the Missouri Supreme Court denying Petitioner's Application to Transfer to that Court (App. C to Petition) are not separately reported but are noted briefly with the opinion of the Missouri Court of Appeals. 671 S.W.2d at 339.

JURISDICTIONAL STATEMENT

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). Respondent specifically denies that jurisdiction of Question 1 of Petitioner's Questions Presented is conferred upon this Court under 28 U.S.C. §1257(3) for the reason, as will be more fully set forth below, that the judgment of the Missouri Court of Appeals, Eastern District, on this point rests upon an independent and adequate state ground. Respondent specifically denies that jurisdiction of Question 2 of Petitioner's Questions Presented is conferred upon this Court under §1257(3) because, as will be more fully set forth below, that Question was never raised, preserved or passed upon by the State courts below (and is, in fact, raised for the first time in this Court).

With respect to Petitioner's gratuitous remarks concerning its Motion for Stay filed in the state court, Respondent notes that Petitioner has not found itself required to file a Motion for Stay in this Court, nor will it be. Respondent affirmatively represents to this Court that no attempt has been made, or will be made, to execute upon the judgement in this case unless and until this Court has either denied certiorari or affirmed the judgment.

Respondent agrees that Petitioner timely filed its Petition in this Court within 90 days of the Missouri Supreme Court's July 17, 1984 denial of Petitioner's Application to Transfer this cause to that court.

STATEMENT OF THE CASE

Petitioner's statement of the case does not constitute a full and fair statement of the facts relevant to the issues herein. In order to avoid repetition additional relevant facts will be set forth under the appropriate point in the argument.

ARGUMENT

I.

The Writ Should Be Denied Because This Court Is Without Jurisdiction Of The Question Petitioner Seeks To Present Concerning Respondent's Argument To The Jury In That The State Courts Below Rejected Petitioner's Contentions On The Basis Of An Independent And Adequate State Ground. In Addition, Respondent's Argument To The Jury Was Entirely Consistent With, And In No Manner Violated, Federal Substantive Law Under The Federal Employer's Liability Act.

This Court is without jurisdiction of the question which Petitioner (sometimes hereinafter also "defendant") seeks to present for review regarding Respondent's (sometimes hereinafter "plaintiff") argument to the jury in this action. The opinion of the Missouri Court of Appeals, Eastern District, on this point clearly indicates that the rejection of Petitioner's claim was based upon an independent and adequate state ground of decision which bars review in this Court. *Murdock v. City of Memphis*, 20 Wall. (87 U.S.) 590, 22 L.Ed. 429 (1875); *Eustis v. Bolles*, 150 U.S. 361, 14 S.Ct. 131 (1893); *Enterprise Irrigation District v. Farmers Mutual Canal Co.*, 243 U.S. 157, 37 S.Ct. 318 (1917); *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183 (1935); *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965); *Michigan v. Tyler*, 436 U.S. 499, 512 n.7, 98 S.Ct. 1942, 1951 n.7 (1978). Further, the adequacy and independence of the state ground is clear from the face of the opinion of the Missouri Court of Appeals, Eastern District, and thus fully meets the test set forth in *Michigan v. Long*, ____ U.S. ____, 103 S.Ct. 3469 (1983).

In the instant case, the Missouri Court of Appeals, Eastern District, rejected defendant's complaints concerning plaintiff's argument on the ground that plaintiff's argument merely countered and was in retaliation to defendant's previous argument, which opened the door to the issue of plaintiff's employ-

ment future with defendant railroad by stating that plaintiff would be working for defendant railroad until retirement. The rules concerning "retaliatory" argument have been long established by Missouri law and have been consistently applied by the Missouri Courts in cases involving state substantive law, as well as in the instant case, which involves the FELA.

Doyle v. St. Louis San Francisco Railway Co., 571 S.W.2d 717 (Mo.App. 1978), cited by the Court of Appeals in the instant case, states the rule well. *Doyle* was a wrongful death action under state law arising out of an automobile/train collision at defendant railroad's crossing. On appeal, defendant railroad claimed, in part, that plaintiff's closing argument to the jury misstated the law, and that such required a new trial. In rejecting that claim, the court held:

> Railroad next urges us to reverse and remand because plaintiffs in argument on rebuttal misstated the law when they argued, "If the railroad track is of itself under all circumstances a warning of danger it wouldn't be necessary for this statute."
>
> [12-14] In determining whether the actions of the trial court with respect to argument of counsel were erroneous we consider oft repeated principles. The control of argument is with the discretion of the trial court and will be interfered with only in the event of abuse or discretion. *Naeger v. Naeger,* 339, S.W.2d 492, 497 (Mo.App. 1960). *A liberal latitude is indulged in argument of counsel especially in response to argument of opposing counsel. Contestible v. Brookshire,* 355 S.W.2d 36, 44 (Mo.1962). When considering argument of counsel on appeal we must attempt to place the challenged portion of the argument in the context of the entire argument and as the participants were seen and heard by the trial judge and we defer to his better opportunity to judge the effect which it might have upon the jury. *Schmid v. Langenberg,* 526 S.W.2d 940, 946 (Mo.App. 1975)

> *It has been said that it is within the province of the judge to determine how the jury might reasonably construe the language used, for language may reasonably convey more than one meaning. Naeger. The trial judge is in a position to discern the inferences conveyed by inflection and gesture.*
>
> 571 S.W.2d at 725, (emphasis supplied).

In *Lewis v. Bucyrus-Erie, Inc.*, 622 S.W.2d 920, 925-26 (Mo.banc 1981), an action based on a state strict liability products theory (and the second authority relied upon by the Court of Appeals in the instant case), the Court held:

> [6, 7] Plaintiffs next pose an array of challenges to comments of defense counsel during closing argument. In this connection several familiar principles bear iteration. The trial court is possessed of broad discretion in the area of closing arguments, not lightly to be disturbed on appeal. *Norfolk & Western Railway co. v. Greening,* 458 S.W.2d 268, 273 (Mo.1970); *S.G. Payne & Co. v. Nowak,* 465 S.W.2d 17, 20 (Mo.App. 1971); *Lineberry v. Robinett,* 446 S.W.2d 481, 486 (Mo.App.1969); *Arroyo v. Keller,* 433 S.W.2d 584, 588 (Mo.App.1968). Further, counsel is accorded wide latitude in arguing facts and drawing inferences from the evidence, id., *and the law indulges a liberal attitude toward argument, particularly where the comment complained of is fair retort or responds to prior argument of opposing counsel. Doyle v. St. Louis-San Francisco Ry. Co.,* 571 S.W.2d 717, 725 (Mo.App. 1978); *Lineberry v. Robinett, id.*
>
> (emphasis supplied)

In *Clark v. Mize,* 525 S.W.2d 635, 637 (Mo.App. 1975), the rule was stated as follows:

> That does not mean that one of the parties arguments will be considered in a vacuum and the other arguments ig-

> nored. To make such an application of Butcher would do away with the principle of fair retort. *When counsel has injected an issue in his part of the argument, he cannot then complain of the answering argument on that issue as raising or arguing improper issues.* (Citing cases)

(Emphasis supplied). See also, *Riley v. St. Louis Public Service Co.*, 245 S.W.2d 666, 673 (Mo.App. 1952); *Penberthy v. Penberthy,* 505 S.W.2d 122, 131 (Mo.App. 1973).

In applying these principles, a review of the opening portion of plaintiff's final argument will reveal a total absence of any comment whatsoever by plaintiff's counsel regarding plaintiff's employment status with the railroad. Nonetheless, in his argument to the jury defense counsel stated as follows:

> Now, after he came back has anyone on the railroad told him he couldn't do his job; that he was sloughing off, that he was lazy, goofing off? No, no. He's done his job. There is work for him, and heaven help us if the economy doesn't get any worse, there'll continue to be work for him. Because of his position, he has no—as you know from his evidence he has over thirty years of seniority from '53 to what will soon be '83. So he's getting on to thirty years of seniority. If anybody can hold a job and seniority in this day and time it will be a man of thirty years in seniority. As you know by the testimony of Mr. Prouty, all of those men with that same type of seniority you heard this morning have made about the same thing. So, *we can expect* that based on the actual experience, the facts not whims and fantasies, *the facts what's going to happen, you can predict from that that Mr. Fravel* just like he's done in two years past *will be working for the Burlington Northern, Frisco, in the Frisco yards in Springfield, Missouri, and that he'll be earning about what the other gentlemen in his craft with the same number of years' seniority are earning.* I think that's pretty obvious. He's done it these past years, he'll do it again. *Will he have any future lost earnings until*

the time of his retirement? Well, that depends on what evidence you believe. If you believe that in the future he's going to need another operation, he's going to lose whatever it takes to have that done in his knee and when he comes back to work. That operation is going to relieve his pain. So it will be better in that respect. It may or may not enable him to get around better and move that left leg. Then let's just assume it does. He'll be vack able to do his work more pain free than before, less the time that it took. Possible future lost wages in this credibility gap that we're talking about to you. Some, but not those hundreds of thousands of dollars. That is what I call a credibility gap. What is the evidence in this case about dollars and cents, Ladies and Gentlemen of the Jury? The only evidence—the only hard evidence is that that I presented to you and faced on Cross, Mr. Fravel said, oh, about thirty thousand dollars. What was the evidence? Well, the evidence was that in those months that we were talking about with Mr. Prouty during those periods of time the total gross, not net, but gross, would have been about the average of those three people; twenty six thousand four hundred dollars. That's the gross. You take the net, that is the take-home pay, the only thing that really counts off of that, and you're talking of some—based on Mr. Prouty's figures of less than twenty thousand dollars. So that's the only hard evidence that's in this case about damages, about past wage loss. Future wage loss, speculation, *but with a man with thirty years of seniority can hold a job—will hold a job and will be there working and earning until retirement.*

(T. 609-611) (emphasis supplied).

Defense counsel's argument, as set forth above, boils down to this: Because plaintiff has managed to work for the past two years, it follows inevitably, according to defense counsel, that plaintiff will be able to and will in fact be working for defendant

until retirement. In short, that the jury should make no award to plaintiff for the impairment of his capacity to work and earn or for future wage loss.

Defense counsel made this argument despite extensive evidence, admitted without objection, that plaintiff has suffered substantially diminished future earning capacity as a result of his injuries. The evidence showed that prior to being crushed by the steel car end, plaintiff was employed by defendant as a laborer, performing the strenuous physical job of dismantling rail cars. He returned to work after 20 months, and was first assigned to the same job he had before he was injured (T. 311). He could not do that job. He could not handle it (T. 311). He was in pain all of the time he was working (T. 311). He had to have the assistance of a ladder to even get in and out of the railroad cars (T. 311). He would have to place the ladder by the car, put his right foot up and drag the left one up behind (T. 311). His condition remained the same up to the present (T. 311-12). Plaintiff, at the time of trial, had been given a different assignment, involving sweeping and cleaning up, filling orders and grading rail (T. 312). He does not get along well on that job either (T. 312). Due to his injuries, he stumbles around. He can't step over things and is unable to bend his knee (T. 312). The situation is miserable (T. 312). Plaintiff described in detail the pain and limitation he endures 24 hours a day, every day (T. 312-16). Plaintiff has told his co-worker about the constant pain and has told him that he is not able to do the work he is doing now (T. 327). Plaintiff has also told his foreman, Mr. Thermon, that he is unable to do the work (T. 327). Mr. Thermon specifically told him that he is not doing the job he is supposed to be doing (T. 327). Sometimes it is so obvious that plaintiff cannot do the work that management must send another man out from the shop to do what plaintiff cannot (T. 328-29). Plaintiff went back to work with these problems because it was his only way of getting income (T. 316-17). However, his condition is getting worse (T. 316). Plaintiff testified, without objection, that he did not know how long the

railroad would keep him after the case was over and did not know how long he would be able to continue working (T. 382). Plaintiff did testify, however, again without objection, that he knows he can be removed from service if he is physically unable to do the job (T. 387).

Nevertheless, defense counsel argued, as set forth above, that the jury could "predict" and "expect" plaintiff to be employed by defendant railroad until retirement.

In response, plaintiff's counsel argued as follows:

> (by Mr. Friedman) He only has one opportunity. You have one opportunity to compensate him for all of the injuries and damages that he sustained to this point and that he'll sustain in the future, *and they say to you, he's got a job?* Have they given you any guarantees up here, any guarantees that Ray's going to be permitted to continue working when this case is over? Use your common sense. Use your common sense. Apart from what he knows his physical condition is going to be in the future.
>
> MR. BUESCHER: Your Honor, I'll object to that. The man's job and his entire position is to be controlled by the bargaining agreement. I resent—I greatly resent counsel's derogatory remarks on that issue.
>
> THE COURT: Objection is overruled.
>
> (by Mr. Friedman) What happens when this case is over. Use your—you know that's something that you take up to the jury room besides these written instructions that have been given to you by the Court. Your good common sense, your personal experience in thirty, forty, fifty years of life, and use it. What type of work is Ray going to be able to do. What type of job is he going to be able to hold. Who is going to hire him? How long is this railroad going to continue permitting him to work?

MR. BUESCHER: Your Honor—

THE COURT: Pardon me?

MR. BUESCHER: I again—I must reiterate to the Court, Your Honor, these kind of slurs are ridiculous. It is not supported by the evidence that's all.

THE COURT: Objection is overruled.
(T.634-635)(emphasis supplied).

Taken in context, it is abundantly clear that plaintiff's counsel in no manner suggested that defendant would fire or discharge plaintiff as soon as the case was over. Plaintiff's argument clearly pertained to the question of plaintiff's impaired earning capacity, as set forth above, and was based upon the above described evidence, which came in without objection, of plaintiff's difficulties in doing the job and the evidence of the future surgical procedures including a total hip replacement and a total knee joint replacement. Defendant's response to that evidence was to imply to the jury that plaintiff was virtually guaranteed a job until normal retirement, thereby attempting to minimize plaintiff's impairment of earning capacity. Plaintiff was justified in retaliating by asking whether defendant had guaranteed plaintiff continued employment—whether it could guarantee him such employment apart from what "he [defense counsel] knows his [plaintiff's] physical condition is going to be in the future." (T. 635) Obviously, a man, such as plaintiff, who is unable to fulfill all the duties of his job and requires assistance from other employees, and who has been advised by his foreman that he is not doing the work, is not guaranteed a job for life. Given plaintiff's severe physical disabilities at the time of the trial and the evidence that he faces future surgical procedures, including a total hip replacement and a total knee joint replacement, it is not unlikely that plaintiff will be unable to continue working or that the railroad may have to let him go for the perfectly legitimate reason that he cannot do his job. Such decisions are normally made by businesses and reference

to this fact in no manner creates passion or prejudice against the defendant. In the instant case it was merely responsive to defense counsel's argument that it could be "expected" or "predicted" that plaintiff would be able to continue working some additional 13 years until retirement. It is equally apparently that plaintiff would be extraordinarily unlikely to find other employment in light of the fact that his education is limited, he has always worked as a physical laborer, and no new employer would hire him as a laborer given his injuries, and his age.

The comments of plaintiff's counsel, in addition to being clearly supported by the evidence and pertinent to the issue of plaintiff's diminished earning capacity, were in direct response to and in retaliation to assurances offered to the jury by defense counsel that he could "predict" and "expect" that plaintiff will "hold a job and will be there working and earning until retirement," (T. 611).

An examination of the opinion of the Court of Appeals makes it clear that, based on the foregoing facts, the court rejected defendant's claims based on the state law rules pertaining to retaliatory argument. In so doing, the court relied solely on *Doyle, supra,* and *Lewis, supra,* both cases dealing exclusively with state law.

For the foregoing reasons, it is respectfully submitted that the judgment on this point below rests upon an independent and adequate state ground, barring review in this Court.

Even if it be assumed, *arguendo,* that this Court has jurisdiction of this matter, plaintiff's argument was entirely proper under existing federal substantive law under the FELA because it properly related to plaintiff's diminished capacity to work and earn money in the future as a result of his injuries, a proper item of damage under the FELA. In *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328, 332 (3rd Cir.), *cert. den.* 364 U.S. 900, 81 S.Ct. 232 (1960), an action under the FELA,

plaintiff returned to his job after sustaining injuries but there was evidence that due to the same, he would not be employable as a new hire. In rejecting a defense contention that the jury improperly awarded damages for loss of future earning capacity, the Court held in part:

> The evidence that Wiles is employed by the Railroad at a larger salary than that which he was receiving when he was injured is a facet of the issue of damages which the jury was entitled to take into consideration as was the testimony that Wiles, with his present medical history, would have difficulty under the conditions of modern industry in obtaining gainful employment in heavy work except with his present employer. *Wiles is presently employed by the Railroad but this will not prevent him from being discharged or from being laid off. Because of his present employment Wiles has not yet suffered economic loss but if he cannot obtain gainful employment elsewhere he is chained to his present job in a kind of economic servitude.* We cannot think that it ws the intention of Congress in enacting the Federal Employers' Liability Act to effect such a result. Certainly, Wiles' economic horizons have been limited by his injury. See *Bochar v. J.B. Margin Motors, Inc.*, 1953, 374 Pa. 240, 94 A.2d 813. See also *Rice v. Philadelphia Transportation Company*, 1959, 394 Pa. 454, 147 A.2d 627; *Stark v. Lehigh Foundries, Inc.*, 1957, 388 Pa. 1, 130 A.2d 123. *The availability to Wiles of the labor market for heavy-duty workers was certainly a factor which the jury was entitled to take into consideration in fixing an amount for damages due to him for loss of future earning power.*
>
> (emphasis supplied)

This portion of the *Wiles* opinion was quite recently cited with approval by the Tenth Circuit in *Fulton v. St. Louis-San Francisco Railway Co.*, 675 F.2d 1130, 1134[9] (10th Cir. 1982).

Plaintiff's argument in the instant case did no more than point out the foregoing very proper considerations to the jury. In fact, in *Wiles*, plaintiff was not even experiencing difficulty in performing his job but there was evidence that he would not be accepted as a new employee elsewhere because of his history of injury. The foregoing statements concerning loss of future earning power have even more force when, as in the instant case, there is specific testimony and evidence that plaintiff is physically unable to perform his employment duties, must have the assistance of other workers and has been told he is not doing the job he is supposed to be doing (T. 312-316, 327-329). Plaintiff's evidence clearly was directed to plaintiff's physical disabilities resulting from his injuries and his consequent inability to properly perform on the job.

Plaintiff does not dispute defendant's claim that punitive damages may not be awarded in an FELA case nor does plaintiff dispute defendant's contention that damages may not be awarded in a FELA case for a discharge in retaliation for the filing of a FELA action. Plaintiff concurs in the view that a railway employee's claim of *wrongful discharge* (i.e., a discharge alleged to be without just cause and/or in violation of the terms of an applicable collective bargaining agreement) is normally within the primary and exclusive jurisdiction of the National Railroad Adjustment Board in the absence of proof that the employee's Union breached its duty of fair representation or some other factor which would undermine the integrity of the adjustment board process. However, the foregoing discussion of the argument at issue here makes it clear that those principles have no application to this case. Defendant concludes and assumes that the argument amounted to a contention that "the railroad would fire Respondent in retaliation for the exercise of his FELA rights as soon as the trial ended, and the jury should compensate Respondent and punish Petitioner for such action." Petition at 6. The foregoing discussion makes it clear that defendant's assumption in this regard is completely erroneous and totally unfounded. On the contrary, plaintiff's

counsel's argument was a proper comment on plaintiff's diminished earning capacity in light of his physical disability, and his future employability given his severe injuries and physical disability, was fully supported by the evidence, and was also a completely proper retaliatory response to defendant's argument that plaintiff, due to his seniority, was assured of continuous and virtually uninterrupted employment and income to retirement age.

The primary cases relied upon by defendant—*Andrews v. Louisville & Nashville Railroad Co.*, 406 U.S. 320, 92 S.Ct. 1562 (1972); *Landfried v. Terminal Railroad Association*, 721 F.2d 254 (8th Cir. 1983), *cert. den.* ____ U.S. ____, 104 S.Ct. 1712 (1984); and *Sharkey v. Penn Central Transportation Co.*, 493 F.2d 685 (2d Cir. 1974)—are all distinguishable from the instant case on this point. In each of the above cases, the plaintiffs sought damages for future lost wages which were attributable *solely* to an alleged wrongful discharge, not to permanent physical injury. In *Andrews*, plaintiff specifically averred that he had completely recovered from injuries sustained in an auto accident but that his carrier employer wrongfully refused to permit him to return to work, thereby in effect wrongfully discharging him. In *Landfried*, plaintiffs specifically based their claim for damages on an allegation of wrongful discharge. Their FELA claims were being litigated separately. In *Sharkey*, the only case of the three which was actually brought for personal injuries under the FELA, plaintiff's injuries were *not* permanent. Nevertheless, his counsel directly suggested to the jury that they should award $125,000.00 for future lost wages, emphasizing that the jury could thereby restore plaintiff's good name, besmirched by an alleged wrongful discharge. Since plaintiff's injuries were not permanent, future wage loss could be attributed only to the alleged wrongful discharge. Similarly, in *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), and *Beanland v. Chicago, R.I. & P.R.*, 480 F.2d 109 (8th Cir. 1973), (relied upon by defendant in the Courts below), damages were sought which would have flowed *solely* from an alleged wrongful discharge, and not

from any permanent physical injury suffered. In the instant case, plaintiff does not, and did not in argument, claim damages in this fashion. On the contrary, this case involves a plaintiff who has suffered severe and permanent injuries impairing his capacity to work and earn in the future. Plaintiff's argument merely responded to defendant's argument and sought to emphasize his legitimate damages due to his impairment of earning capacity flowing from his permanent and disabling physical injuries. *Wiles v. New York, Chicago & St. Louis Railroad Co.*, 283 F.2d 328, 332 (3d Cir.), *cert. den.*, 364 U.S. 900, 81 S.Ct. 232 (1960).

For the foregoing reasons, the writ should be denied as to Question 1.

II.

The Alleged Federal Question Contained In Question 2 Of Petitioner's Questions Presented, Dealing With The Exhibition Of Plaintiff's Injuries To The Jury, Was Never Presented To Or Passed On By, The State Courts Below, And Is Raised By Petitioner For The First Time In This Court. The Objections Made By Petitioner To The Exhibition In The Courts Below Were Based Solely Upon Questions Of State Law. Accordingly, This Court Is Without Jurisdiction Of Question 2.

The Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1257(3). On its face, §1257(3) requires that a federal right, such as that referred to in Petitioner's Question 2, be "specifically set up or claimed" in the state proceedings in order to confer jurisdiction upon this Court. This Court is without jurisdiction of an alleged federal question which has "never been raised, preserved or passed upon in the state courts below." *Cardinale v. Louisiana*, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162 (1969).

Stated differently, to sustain this Court's jurisdiction under §1257(3), the question presented by the Petition for Writ of Certiorari must have been presented to the state courts in such a

way that it was necessarily passed on by the state appellate courts in affirming the judgment below. *Street v. New York*, 394 U.S. 576, 581-582, 89 S.Ct. 1354, 1360 (1969). *See also Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66 (1945) (same principle on direct appeal).

The prevailing test as to whether a federal question was sufficiently presented in the state courts to confer jurisdiction on this Court to review that question was stated by this Court in *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 49 S.Ct. 61 (1928). *Zimmerman* held a federal question must be raised "with fair precision and in due time" in the state courts in order to be reviewed in this Court.

In applying this test, two considerations should be kept in mind. First in order to present the federal question with "fair precision", the party presenting the question must at least make it clear that *federal*, rather than state law is being relied on. *See, e.g., Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894 (1981); *Bailey v. Anderson*, 326 U.S. 203, 206, 66 S.Ct. 66, 68 (1945); *New York Central & H.R.R. Co. v. New York*, 186 U.S. 269, 22 S.Ct. 916 (1902).

Secondly, whether the federal question was raised in "due time" is a question normally determined by state procedural rules. *See, e.g., Webb v. Webb*, 451 U.S. 493, 501, 101 S.Ct. 1889, 1894 (1981); *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962 (1962).

The "federal" issue Petitioner seeks to present in Question 2 fails this test on both counts.

First, the record shows that Petitioner, at all times throughout the State court proceedings at all levels, stated its complaint concerning the exhibition solely in terms of state, not federal, law. This becomes apparent quite quickly if one examines the portions on the record referred to by Petitioner in its attempts to comply with Rule 21(h) of the Rules of this Court,

which generally requires that Petitioner specify that time and manner in which its alleged federal question was raised and preserved in the state court (Petition at 4-5). Significantly, Petitioner advises the Court of the timing of its objections, but fails to specify the substantive basis of the claims it presented in state court.

Recourse to the record shows that the only ground for the objection which Petitioner interposed immediately prior to the exhibition of Plaintiff's injuries to the jury was as follows:

> "MR. BUESCHER: I would object to any demonstrations of the patient as being intended to inflame the jury, Your Honor. It will prove nothing for the benefit of the jury. Everything that he would show has already been demonstrated—testified to. The only purpose of any viewing of the injury of this man would be, sir, only to inflame them. It would be so highly prejudicial as to in this case, and as to the harm of this trial and I would object to it, Your Honor."

(T. 460; App. D to Petition, p. A-11). This objection clearly relies solely on Missouri state law, and contains no hint that it pertains to, or relies upon, any federal claims. Similarly, when Petitioner moved for a mistrial following the completion of the testimony of plaintiff's medical expert, the sole basis of Petitioner's claim was that the now-completed demonstration was alleged to have been merely repetitive and therefore served no purpose other than to inflame the jury and arouse passion and prejudice (T. 508; App. D to Petition, at A-12). Similarly, petitioner's motion for new trial alleged no more than that the demonstration was improper because it allegedly inflamed the passion and prejudice of the jury (Motion for New Trial, paragraph 24, 25; App. E to Petition at A-15). Similarly, the basis of Petitioner's claims on appeal before the Missouri Court of Appeals, Eastern District (Petitioner's Brief in the Court of Appeals, Point I, App. F to Petition at A-16-17), in its Motion for Rehearing, paragraph 2 (App. G to Petition at

A-23), and in its Application for Transfer to the Missouri Supreme Court, Point II (App. H to Petition at A-25-26) continued to be the *state law* claim of improper appeal to the passion and prejudice of the jury. At no time in the various proceedings in the Missouri state courts did Petitioner ever claim (as it does for the first time in this Court, see Petition at 12) that permitting the exhibition of plaintiff's injuries to the jury somehow violated the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. Even in its Application to Transfer to the Missouri Supreme Court, filed after the opinion of the Missouri Court of Appeals at issue herein was entered, Petitioner claimed only that the Court of Appeals' rejection of Petitioner's contentions concerning the exhibition was "contrary to the existing Missouri decisional law." (Application to Transfer, Point II; App. H to Petition at A-25). The Application made no mention whatsoever of federal law on this point.

Thus, Petitioner did not even seek to present its alleged federal issue in its Motion for Rehearing or its Application for Transfer [compare *Eddings v. Oklahoma*, 455 U.S. 104, 113 n. 9, 102 S.Ct. 869, 876 n. 9 (1982)]. The federal claim is raised for the first time in this Court.

Petitioner utterly failed to present a federal question with fair precision, in due time and in accordance with Missouri procedure in the state courts. The question presented by Petitioner in this Court was not passed on by the state courts. No federal claim was specially set up or claimed by Petitioner. Consequently, this Court has no jurisdiction of Question Presented 2 under 28 U.S.C. §1257(3). *Tacon v. Arizona*, 410 U.S. 351, 93 S.Ct. 998 (1973); *Street v. New York*, 394 U.S. 576, 89 S.Ct. 1354 (1962); *Cardinale v. Louisiana*, 394 U.S. 437, 89 S.Ct. 1161 (1969); *Beck v. Washington*, 369 U.S. 541, 549-554, 82 S.Ct. 955, 960-962 (1962); *Ellis v. Dixon*, 349 U.S. 458, 75 S.Ct. 850 (1955); *Edelman v. People of California*, 344 U.S. 357, 73 S.Ct. 293 (1953); *Bailey v. Anderson*, 326 U.S. 203, 66 S.Ct. 66

(1945); *State Farm Mutual Ins. Co. v. Duel*, 324 U.S. 154, 65 S.Ct. 573 (1945); *Herndon v. Georgia*, 295 U.S. 441, 55 S.Ct. 794 (1935); *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 23 S.Ct. 375 (1903).

For jurisdictional purposes, this case is controlled by *Webb v. Webb*, 451 U.S. 493, 101 S.Ct. 1889 (1981). In *Webb*, a child custody matter, petitioner (the mother) claimed in the Georgia state courts that they were required to give "full faith and credit" to a Florida judgment awarding her custody. The mother did not mention the federal constitution in making this claim nor did she specifically refer to Article IV, §1 of the United States Constitution. The Georgia courts awarded the father custody. On petition for writ of certiorari, this Court held that petitioner's references to "full faith and credit" in the Georgia courts referred to state law issues under Georgia's Uniform Child Custody Act, a statutory full faith and credit requirement. Since petitioner did not set forth in the state courts that her "full faith and credit" claim was based on federal law, the writ was dismissed for lack of jurisdiction, and this Court held:

> "At the minimum, however, there should be no doubt from the record that a claim under a federal statute or the federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.
>
> Because petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court failed to rule on a federal issue, we conclude that we are without

jurisdiction in this case. Accordingly, the writ is dismissed for want of jurisdiction."

451 U.S. at 501-502, 101 S.Ct. at 1894.

So it is here.

Further, Petitioner's claim in this Court that the alleged error of state law by the Missouri Courts in "this FELA case" infringes upon Petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution does not constitute a federal question of substance, reviewable in this Court. If such were the case, any litigant who could similarly claim identification with a particular class of litigants could claim a right in this Court to seek review of *any* state issue decided adversely to such litigant. As stated by this Court in *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 165-166, 37 S.Ct. 318, 321-322 (1917):

> "The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the 14th Amendment, requires but brief notice. The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law. *Sayward v. Denny,* 158 U.S. 180, 186, 39 L. ed. 941, 943, 15 Sup. Ct. Rep. 777; *Central Land Co. v. Laidley,* 159 U. S. 103, 112, 40 L. ed. 91, 94, 16 Sup. Ct. Rep. 80; *Castillo v. McConnico,* 168 U.S. 674, 683, 684, 42 L. ed. 622, 625, 626, 18 Sup. Ct. Rep. 229. The questions presented, other than those relating to the validity of the state board's adjudication, all turned exclusively upon the law of the state, and the state court's decision of them is controlling. *Preston v. Chicago,* 226 U. S. 447, 57 L. ed.

293, 33 Sup. Ct. Rep. 177; *St. Louis & K.C. Land Co. v. Kansas City*, 241 U. S. 419, 427, 60 L. ed. 1072, 1077, 36 Sup. Ct. Rep. 647; *Old Colony Trust Co. v. Omaha*, 230 U. S. 100, 116, 57 L. ed. 1410, 1416, 33 Sup. Ct. Rep. 967. The reference to the equal protection clause evidently is inadvertent, for there is no claim of unwarranted or arbitrary discrimination.

It results from what has been said that the judgment is one which is not open to review by this court.

Writ of error dismissed."

Similarly, in the instant case there is no claim of unwarranted or arbitrary discrimination on this point—only a claim of misapplication of Missouri law. Nor could this Petitioner sensibly make a claim of such discrimination given the fact that this same Missouri Court of Appeals, Eastern District, reversed a very substantial FELA judgment against this very same Burlington Northern Railroad (and in favor of a plaintiff represented by plaintiff's counsel in this case), relying in part on the same state law ground at issue here: appeal to the passion and prejudice of the jury by misuse of demonstrative evidence. *Anderson v. Burlington Northern Railroad Co.*, 651 S.W.2d 176, 182-183 [6] (Mo.App. 1983). It is noteworthy that Judge Simon, of the Missouri Court of Appeals, sat on the panel which reversed in *Anderson* and on the panel which affirmed in the instant case.

For all the foregoing reasons, Respondent respectfully suggests that this Court lacks jurisdiction of Petitioner's Question Presented No. 2.

III.

Defendant's Contentions Regarding The Omission Of The Word "Direct" From MAI No. 8.02 Are Likewise Entirely Without Merit.

Defendant's contentions concerning the absence of the word "direct" from MAI No. 8.02. are without merit. It is a full and complete answer to defendant's constitutional contentions that the absence of the word direct from MAI 8.02 is for the purpose of making that instruction comply with the substantive law. Since the instruction is in this form for the purpose of complying with the substantive federal law, there can be no violation of equal protection, due process or the Supremacy clause, as this would clearly constitute a reasonable basis for the differences between MAI No. 8.02 and MAI No. 4.01. This matter was carefully considered by the Missouri Supreme Court Committee on Instruction and this change was only recently made in the 1978 revisions. The Committee explains this change as follows:

> This instruction is used only in an F.E.L.A. case wherein the employee sustained injury. It is a duplicate of MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is done in an F.E.L.A. case so that the instruction complies with the correct substantive law, *Wilmoth v. Rock Island Railroad,* 486 S.W.2d 631 (Mo. 1973); *Crane v. Cedar Rapids and Iowa City Ry.,* 352 U.S. 500 (1957)." (MAI No. 8.02, Committee's Comment.)

The reasoning underlying the omission of the word direct from this damages instruction is further amplified in the committee's comment to the revision to MAI No. 24.01, which states as follows (MAI No. 24.01, Committee's Comment):

> In an F.E.L.A. case, common law negligence rules are controlling except that these rules have been abrogated by F.E.L.A. Because of the "in whole or in part" language

of the statute (Title 45, U.S.C.A., Section 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the slightest cause of the employee's injury. *Rogers v. Mo. Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

In the traditional negligence case, it is mandatory for the plaintiff to include the word 'direct' or 'directly' in his instruction because of the proximate (direct) cause requirements.

This prevents the jury from awarding damages or finding for plaintiff because of some indirect or contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. 'was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence.' *Rogers v. Mo. Pac. Ry., supra,* 352 U.S. 500, 507. The test of a jury case under F.E.L.A. is simply 'whether the proofs justify within reason the conclusion that employer's negligence played any part, even the slightest, in producing injury or death for which damages are sought.' (emphasis added). *Rogers v. Mo. Pac. Ry., supra,* 352 U.S. 500, 506. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. C & O Ry. Co.*, 497 F.2d 1243, 1246.

As the United States Supreme Court has stated in *Rogers v. Mo. Pac. Ry., supra,* in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the

Missouri state courts. *Headrick v. Kansas City Southern Ry.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

It is obvious from the foregoing that the Missouri Courts recognize that federal law is controlling as to substantive aspects of the F.E.L.A. in cases tried in state court. The present form of MAI 8.02 is nothing more or less than action designed to conform MAI instruction to federal substantive law.

Additionally, this same railroad petitioner has previously raised precisely this same issue concerning the validity of MAI 8.02 and the absence of the word "direct" from that instruction. Petitioner's identical contentions were rejected by the Missouri Supreme Court, en banc, and Petitioner's petition for a writ of certiorari raising the same contentions was denied by this Court. *Bair v. St. Louis-San Francisco Railway Co.*, 647 S.W.2d 507 (Mo.banc), cert. denied sub. nom. Burlington Northern, Inc. v. Bair, ____ U.S. ____, 104 S.Ct. 107 (1983). The *Bair* opinion was authored by Judge Blackmar, an acknowledged authority on federal jury practice and co-author of *Devitt & Blackmar, Federal Jury Practice and Instructions*, and the *Bair* opinion clearly discloses no concern that MAI 8.02 deprives railroad defendants of any substantive federal rights under the FELA. In this regard, a review of the damage instructions contained in *Devitt & Blackmar,* a standard and established source for pattern federal instructions, shows that they do not uniformly require inclusion of the word "direct."

In short, Petitioner has wholly failed to make any showing whatsoever that MAI 8.02 does not accurately reflect the federal substantive law under the FELA or that its use violates any of Petitioner's constitutional rights. Accordingly, its contentions should be rejected in their entirety.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that no aspect of the judgment below warrants review by this Court, and that the Petition for Writ of Certiorari should accordingly be denied.

Respectfully submitted,

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